No. 07-1336

In The Supreme Court of the United States

COLLEEN V. WILCOX, et al.,

Cross-Petitioners,

v.

UNITED STATES ex rel.
JOHN DAVID STONER,

Respondent.

On Cross-Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR THE STATES OF CALIFORNIA, ALABAMA, ALASKA, HAWAII, IDAHO, IOWA, KANSAS, MASSACHUSETTS, MISSISSIPPI, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, OHIO, OKLAHOMA, OREGON, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, WASHINGTON, WEST VIRGINIA, AND WYOMING AS AMICI CURIAE IN SUPPORT OF CROSS-PETITIONERS

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QUESTIONS PRESENTED

The False Claims Act (FCA), 31 U.S.C. §§ 3729-3733, authorizes a private individual (the relator) to bring a *qui tam* civil action for treble damages and per claim penalties against "[a]ny person" who, *inter alia*, "knowingly presents, or causes to be presented, to an officer or employee of the United States Government . . . a false or fraudulent claim for payment or approval." First enacted in 1863, the FCA's liability provision does not include a definition of the word "person." In *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000), this Court held that States and state agencies are not "person[s]" amenable to *qui tam* suits under the FCA. Although the Court expressed "serious doubt" as to whether such suits would even be permitted under the Eleventh Amendment, it did not decide the issue, nor did it decide whether individual state officials are "person[s]" amenable to *qui tam* suits under the FCA. The questions presented are:

1. Whether the Ninth Circuit erred in holding that state officials are "person[s]" amenable to *qui tam* suits under the FCA for actions taken in their official capacities.

2. Whether the Ninth Circuit erred in holding that the Eleventh Amendment does not bar the continued prosecution of an FCA *qui tam* suit brought against state officials after the United States declines to intervene in that suit.

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INTEREST OF AMICI CURIAE[1]

In *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000), this Court held that states could not be sued by private relators under the False Claims Act (FCA). This case presents the question of whether private relators may side-step *Stevens* by suing state officials for alleged false claims submitted in the course of their duties and from which they received no personal financial benefit. Such actions would permit relators to harass state officials with costly and protracted litigation, to threaten them with potentially overwhelming personal liability, and to mount back-door challenges to the operation of state programs in federal court. In addition, the circuit split created by *Stoner* causes uncertainty for states and state officials as they consider whether and how to participate in federal programs. The states have a natural interest in the resolution of this question.

ARGUMENT

In *Stevens* this Court protected states from *qui tam* actions by private relators under the FCA. The Ninth Circuit's decision in this case creates a circuit split on the question of whether private relators may side-step *Stevens* by suing state officials for acts performed in the course of their duties and from

[1] Counsel of record received notice of amici's intent to file this brief more than ten days before the due date.

which they received no personal financial benefit. Such suits will create serious practical problems for the day-to-day operation of state programs because they will expose individual state officers and employees to costly and protracted litigation carrying the threat of substantial personal liability and because they will permit any person to bring a back-door challenge to the operation of any state program that receives federal funding. The circuit split created by *Stoner* also creates uncertainty for states and state officials as they consider whether and how to participate in cooperative state-federal programs.

I. THE COURT OF APPEALS' DECISION CREATES A CIRCUIT SPLIT ON THE QUESTION OF WHETHER INDIVIDUAL CAPACITY *QUI TAM* ACTIONS AGAINST STATE OFFICIALS FOR ACTIONS TAKEN IN THE COURSE OF THEIR DUTIES STATE A CLAIM.

The Ninth Circuit's decision in this case conflicts with *Gaudineer v. Iowa*, 269 F.3d 932 (8th Cir. 2001), on the question of whether individual capacity *qui tam* actions against state officials for actions taken in the course of their duties, and from which they received no personal financial benefit, state a claim upon which relief may be granted. The Ninth Circuit acknowledged this conflict when it disagreed with *Gaudineer* to the extent that its reasoning "cannot be reconciled with the plain language of the [FCA]." *Stoner v. Santa Clara County Office of Educ.*, 502 F.3d 1116, 1124 (9th Cir. 2007).

In *Stoner* the relator alleged that two California school districts[2] and three district employees were violating the FCA by accepting federal funding while failing to comply with requirements for special education programs. The district court dismissed the action for failure to state a claim. (App. to Cross-Pet. 37a.) The court relied upon *Stevens*, which held that relators could not sue states under the FCA because "various features of the FCA, both as originally enacted and as amended, far from providing the requisite affirmative indications that the term 'person' included States for purposes of *qui tam* liability, indicate quite the contrary." 529 U.S. at 787.[3] The district court held that the relator's complaint failed to state a claim against the individual defendants because the relator had "offer[ed] no evidence that the employee defendants were acting outside their official capacities during the incidents in question." (App. 37a.)

The Ninth Circuit affirmed the dismissal as to the districts but reversed as to the individual defendants. It held that "state employees may be sued in

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[2] California school districts are arms of the state for purposes of Eleventh Amendment sovereign immunity. *See Belanger v. Madera Unified School Dist.*, 963 F.2d 248, 254 (9th Cir. 1992); *Eaglesmith v. Ward*, 73 F.3d 857, 860 (9th Cir. 1995).

[3] *Stevens* did not reach the question of whether such an action would also run afoul of the Eleventh Amendment, but it noted "that there is 'a serious doubt' on that score." *Stevens*, 529 U.S. at 787, *quoting Ashwander v. TVA*, 297 U.S. 288, 348 (1936).

their individual capacities under the FCA for actions taken in the course of their official duties" and that the district court had therefore "erred in holding that Stoner had failed to state a claim under § 3729 against [the individual defendants] in their personal capacity." 502 F.3d at 1125.

This holding is in direct conflict with *Gaudineer*. There, the relator alleged that the State of Iowa, a state agency, and a state official were violating the FCA by using Medicaid funds to provide home and community-based services to certain categories of developmentally disabled persons. *Gaudineer*, 269 F.3d at 934-35. After *Stevens* was decided the relator dismissed its action as to the state and the agency and it sought leave to amend to name the official in his individual capacity. The district court denied leave to amend because the amendment would have been futile. *Id*. at 935-36. The amended complaint failed to state a claim because the official "had been implementing a state policy . . . and had performed no acts in his individual capacity." *Id.*

The Eighth Circuit affirmed the denial of leave to amend. *Id*. at 938. It held that "[i]n determining whether a state official may be liable for money damages in his individual capacity courts should not rely wholly on 'the elementary mechanics of captions and pleading'. . . . [they] should look at whether the alleged conduct of the defendant was 'outside of [his] official duties.'" *Id.* at 936, *quoting Idaho v. Coeur d' Alene Tribe of Idaho*, 521 U.S. 261, 270 (1997) and *Bly-Magee v. California*, 236 F.3d 1014, 1016 (9th Cir.

2001). The proposed amendment did not allege "what [the employee's] specific duties or powers were . . . or how he acted outside those duties. . . ." and the district court therefore "did not err in denying the motion for leave to amend to add a new claim against [the official] in his individual capacity." *Id.*[4]

Thus, *Stoner* and *Gaudineer* are in direct conflict on the question of whether individual capacity *qui tam* actions against state officials for acts performed in the course of the official's duties state a claim upon which relief may be granted. *Compare Stoner* 502 F.3d at 1125 *with Gaudineer*, 269 F.3d at 936. This conflict is reflected in the divergent approaches taken by other courts that have addressed this issue. *See, e.g., Alexander v. Gilmore*, 202 F. Supp. 2d 478, 480 (E.D. Va. 2002) (relator may not sue state officials); *United States ex rel. McVey v. Bd. of Regents*, 165 F. Supp. 2d 1052, 1059 (N.D. Cal. 2001) (same); *Bly-Magee v. California*, 236 F.3d 1014, 1016 (9th Cir. 2001) (same); *United States ex rel. Burlbaw v. Regents*, 234 F. Supp. 2d 1209, 1218 (D.N.M. 2004) (relators may sue state officials); *United States ex rel. Battle v. Board of Regents of Georgia*, No. 1:00-CV-1637, 2002 WL 34386372 (N.D. Ga. 2002) (same); *also State ex rel. Dockstader v. Hamby*, 162 Cal. App. 4th 480, 484 (2008) ("employees of a public agency, acting

[4] *Gaudineer* did not reach the questions of whether a state official is a "person" for purposes of the FCA or whether *qui tam* actions against state officials would be barred by the Eleventh Amendment. 269 F.3d at 938, n. 3.

in the course and scope of their employment, and solely on the agency's behalf, are not proper defendants under" the California False Claims Act).

II. THE DISRUPTION AND UNCERTAINTY CREATED BY *STONER* IS OF SUBSTANTIAL AND IMMEDIATE CONCERN TO THE STATES.

The questions posed by this case are of substantial and immediate concern to the states. The individual capacity *qui tam* actions permitted by *Stoner* will interfere with state programs by permitting private relators to threaten state officials with costly and protracted litigation carrying the threat of substantial personal liability. These actions will also permit relators to mount back-door challenges to the operation of any state program or agency that accepts federal funding. As a result, these actions are, from the states' perspective, no different from the direct actions barred by *Stevens*. The circuit split created by *Stoner* also creates substantial uncertainty for states and state officials that are considering whether and how to participate in state-federal cooperative programs.

A. The actions permitted by *Stoner* will create serious practical problems for the administration of state programs.

Stoner will create serious practical problems for the day-to-day operation of every state agency and

program throughout the country that receives federal funding. *Stoner* will permit any person to challenge a state's technical non-compliance with federal eligibility requirements by bringing a *qui tam* action that will be costly to defend and which will threaten state officers or employees with potentially overwhelming personal liability.

It will not be difficult for private persons to bring *qui tam* actions that, even if ultimately meritless, will subject the states and their individual employees to protracted litigation that will be costly to defend in terms of staff time, agency resources, and legal fees. *See* David T. Bradford, *Qui Tam Litigation: an In-house Perspective*, N97WCCB ABA Legal Ed. I-19 (1997); *The False Claims Act Correction Act (S. 2041): Strengthening the Government's Most Effective Tool Against Fraud for the 21st Century:* Hearing on S. 2041 Before the S. Comm. on the Judiciary, 110th Cong. (2008) (statement of John T. Boese) (discussing the costs of defending a *qui tam* action); William E. Kovacic, *The Civil False Claims Act as a Deterrent to Participation in Government Procurement Markets*, 6 Sup. Ct. Econ. Rev. 201, 225 (1998). The FCA imposes liability on any person who knowingly presents a false or fraudulent claim for payment to the federal government. 31 U.S.C. § 3729(a)(1). The relator is not required to prove that the defendant had an intent to defraud the government. He or she need only show that the defendant acted with deliberate ignorance or reckless disregard of the truth or falsity of the claim. 31 U.S.C. § 3729(b). It is therefore difficult to defend

a *qui tam* action based upon the defendant's mental state. *See* John Munich and Elizabeth Lane, *Symposium: When Neglect Becomes Fraud: Quality of Care and False Claims*, 43 St. Louis L.J. 27, 36 (1999).

In addition, a claim does not need to be fraudulent to be actionable under the FCA – it need only be false. 31 U.S.C. § 3729(a). A claim may be false if it is based upon a reasonable but ultimately incorrect interpretation of a federal regulation. *United States ex rel. Oliver v. Parsons Co.*, 195 F.3d 457, 463 (9th Cir. 1999). A claim that is true on its face may still be false for purposes of the FCA if it constitutes an implied false certification of compliance with a federal program requirement. *United States ex rel. Mikes v. Straus*, 274 F.3d 687, 700 (2d Cir. 2001). Thus, it will not be difficult for relators to harass public officials with *qui tam* actions that, even if ultimately meritless, will burden the defendants with costly and protracted litigation.

These *qui tam* actions will not be restrained by considerations of fairness or sound public policy or by traditional concepts of standing. Relators are not public prosecutors. The *qui tam* provisions of the act enable lawsuits motivated by the "'strong stimulus of personal ill will'" or the "prospect[ ] of monetary reward rather than the public good." *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 949 (1997), *quoting United States ex rel. Marcus v. Hess*, 317 U.S. 537, 541, n. 5 (1943) and *United States v. Griswold*, 24 F. 361, 366 (D. Or. 1885). Moreover, there is no requirement that a person demonstrate

individualized standing in order to pursue a *qui tam* action. *See Stevens*, 529 U.S. at 774.[5]

These actions will interfere with the administration of state programs. First, they will threaten state officers and employees with costly and protracted litigation carrying the potential of overwhelming personal liability. The treble damages, civil penalties, costs, and attorneys fees available to relators under the FCA, combined with the size of most federal

[5] *Qui tam* actions, which "hold[ ] out a temptation, and 'set[ ] a rogue to catch a rogue,' " are critical to identifying and prosecuting frauds perpetrated by private contractors against the government. *See United States ex rel. Foulds v. Texas Tech Univ.*, 171 F.3d 279, 293 (5th Cir. 1999), *quoting* Cong. Globe, 37th Cong., 3d Sess. 955-956 (1863). Indeed, this was their purpose. *Stevens*, 529 U.S. at 782. Yet they are ill suited to the states or to state officials. The states are not profit-driven private corporations. They are sovereign states, accountable to the electorate, whose acts and programs are subject to public scrutiny and review. *See* Cal. Gov't Code §§ 11120-11132 (requiring public meetings); CAL. CONST. art. I, § 3 (guaranteeing access to public records); Cal. Gov't Code §§ 6250-6270 (same). State officials are, by and large, dedicated public servants and they have no personal financial incentive to submit false claims on behalf of the states. The states work closely with their federal partners to implement joint programs that involve detailed reporting, audit and information exchange requirements. *See, e.g.,* 29 U.S.C. § 667(c)(8); 29 C.F.R. §§ 1954.1-1954.22 (state OSHA programs). Moreover, the states and the federal government share an enduring relationship that will last as long as the Union stands. The federal government can easily review a state's use of federal funds, and it will always be able to recover any over-payment by reducing the amount of future payments to the state. *See, e.g.,* 32 U.S.C. § 710 (recovery of funds provided for the National Guard).

grants to the states, mean that the damages in such a case would quickly exceed the personal assets of most civil servants. *See* 31 U.S.C. §§ 3729(a), 3730(d). Indeed, the potential treble damages in a *qui tam* action challenging California's eligibility for the $23,000,000,000 in federal health care funds administered by the state's Department of Health Care Services, would equal a staggering 70% of the state's general fund budget. *See* State of California*, Governor's Proposed Budget for Fiscal Year 2008-2009,* sched. 9. Even in this case, which involves federal aid for the operation of a small alternative school, the FCA treble damages alone sought from the three individual defendants exceed $2,500,000. (App to Cross-Pet. 95a, 97a, 99a.)

The states will have no choice but to defend these actions and indemnify their employees. The states, like the federal government, regularly defend and indemnify their officers and employees from claims arising from actions taken in the course of their official duties. *See, e.g.,* Cal. Gov't Code § 825; N.Y. Pub. Off. Law § 17; 28 C.F.R. § 50.15. This protection is vital to the states' ability to attract and retain qualified public servants. It also provides state officials with the ability to do their jobs without being paralyzed by the fear that any misstep could impose substantial personal liability on themselves and their families.[6] It gives them room to take initiative and to

[6] Private sector employees are not forced to stand alone in the face of a *qui tam* action because their employers may also be sued. State employees do not enjoy this same protection because

(Continued on following page)

be innovative in designing and implementing public programs. Given this reality of indemnification, the effect of individual capacity actions will be "identical to a suit against the state. The money will flow from the state treasury to the plaintiffs. This is not hypothetical, but inescapable . . . " *Luder v. Endicott*, 253 F.3d 1020, 1024 (7th Cir. 2001); *see also* Claire M. Sylvia, *The False Claims Act: Fraud Against the Government* 221, n. 19 (2004) (encouraging relators to confirm that a public employee defendant will be indemnified before bringing suit).

These actions will also interfere with the administration of state government because they are in substance challenges to the state's compliance with federal program requirements. A judgment for the relator would force the state to stop accepting the federal funding at issue or to change the challenged program, regulation or statute to comply with the relator's demands. If not, state officials would continue to face mounting treble damages and civil penalties for an ongoing violation of the FCA. The states will have no choice but to defend these actions.

These suits will provide a back-door for private relators to challenge the compliance of state programs, regulations, and statutes with federal program requirements in federal court. For example, every cabinet-level agency of the State of California

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states may not be sued by relators under the FCA. *See Stevens*, 529 U.S. at 787.

receives and administers federal funds. In total, 65 different California state agencies receive more than $70 billion in federal funds and property annually in more than 350 different program areas. *See* State of California, *Governor's Proposed Budget for Fiscal Year 2008-2009*, sched. 9; California Department of Finance, *Single Audit Report 2005-2006* 175-191. These federal funds and property flow to agencies as diverse as California's Office of Emergency Services ($1,013,606,000); Arts Council ($1,086,000); Departments of Toxic Substances Control ($27,391,000), Forestry and Fire Protection ($22,577,000) and California Highway Patrol ($17,546,000); National Guard ($882,661,000); State Library ($19,633,000); and the California Judiciary ($8,239,000). *Id.* Every one of these departments will become a potential target for *qui tam* actions motivated by personal animus, political disagreement, or the prospect of monetary gain. Cooperative state-federal programs such as Medicaid will be most vulnerable to these attacks because they combine large amounts of federal funding, complex systems for the delivery of public services, and detailed and voluminous federal program requirements. *See, e.g.,* 42 U.S.C. §§ 1396-1396v (state Medicaid programs); 42 C.F.R. §§ 430.0-476.104 (same); Ctrs. for Medicare & Medicaid Servs., Pub. No. 45, *The State Medicaid Manual*. California's Department of Health Care Services alone administers more than $23,000,000,000 in federal health care funding annually. *See* State of California*, Governor's Proposed Budget for Fiscal Year 2008-2009*, sched. 9.

The states' fear that individual capacity *qui tam* suits will invite back-door challenges to state programs is rooted in experience. In *Stoner* the relator used a *qui tam* action to mount a detailed challenge to the manner in which special education services are provided to high school students. *See Stoner*, 502 F.3d at 1120-21. He challenges the districts' practices for academic testing, provision of textbooks and classroom access to the Internet, access to social, recreational and extracurricular activities, and the operation of the districts' intern teacher program. (App. to Cross-Pet. 74a-87a.) *Gaudineer* was no different. There, the relator attempted to use a *qui tam* action to challenge the State of Iowa's decision to expand eligibility for home and community based care services for persons with developmental disabilities. *Gaudineer*, 269 F.3d at 934-35. Similarly, in *Alexander*, the relators, a state prisoner and a former state prisoner, attempted to use a *qui tam* action to challenge Virginia's procedures for conducting inmate drug testing and its process for disposing of urine collected for testing. *Alexander*, 202 F. Supp. 2d at 480. Each of these cases involved a back-door challenge to the operation of a state program.

Stoner will create serious practical problems for the day-to-day operation of any state program that receives or administers federal funds or property. The individual capacity suits authorized by *Stoner* will subject individual state officials to costly and protracted litigation and potentially overwhelming personal liability. They also will permit any person to

bring a back-door challenge to the operation of any state program that receives federal funding.

B. The circuit split created by *Stoner* causes uncertainty for the states as they consider whether and how to participate in federal programs.

The uncertainty created by the circuit split between *Stoner* and *Gaudineer* is of immediate concern to the states and to their officers and employees as they consider whether and how to participate in myriad federal programs. States will be forced to weigh the benefits of accepting a federal grant against the risk that they will be forced to defend a costly and protracted federal *qui tam* action motivated by animus, political disagreement with the targeted program, or the prospect of monetary reward, which seeks to recover three times the amount of the grant. *Cf.* Kovacic, *supra*, at p. 235 (discussing economic impact of FCA on private contractors). The risk of *qui tam* actions will also affect how the states implement federal programs. Cooperative federalism is intended to take advantage of the states' "expertise and judgment" in implementing public programs. *BellSouth Telecomms., Inc. v. Sanford*, 494 F.3d 439, 449 (4th Cir. 2007). However, the willingness of these state "laboratories of democracy" to try novel or innovative approaches that better serve the public interest will be tempered by the risk that such efforts will serve as magnets for private *qui tam* lawsuits.

This Court should grant certiorari to resolve this uncertainty.

CONCLUSION

The cross-petition for a writ of certiorari should be granted.

Respectfully submitted,

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